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Dato' Leaw Seng Hai v Datuk Leaw Ah Chye

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(W)-1831–11 OF 2015
ROHANA YUSUF, IDRUS HARUN AND ABDUL RAHMAN SEBLI JJCA
19 OCTOBER 2017

C

Contract — Interpretation — Of contract — Agreement between parties — Dispute on interpretation of heads of agreement ('HOA') — Whether appellant obliged to purchase shares of respondent under HOA and amendment to HOA — Whether phrase 'the option' which used in cl 28 of HOA which was later amended, similarly applied to all other clauses of HOA

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The appellant and respondent had entered into a settlement whereby the appellant was to acquire 2,157 shares of Datuk Leaw Tua Choon ('DLTC') in Oceanview, 1,700 ordinary shares owned by DLTC in Oceancove and the respondent's interest in Oceanview and Oceancove. The appellant and respondent later entered into the heads of agreement ('the HOA') to resolve conflict between them in relation to their shares in Oceanview and Oceancove. However, disputes arose on the interpretation of the HOA regarding the obligations of the parties resulting in the filing of the action by the respondent at the High Court. The appellant suggested to the respondent and DLTC that the HOA needed to be amended to avoid triggering provisions under the Code of Merger and Takeover. The respondent agreed and an amendment to the HOA was signed. The issues for consideration were: (a) whether the appellant was obliged to purchase shares of respondent; (b) whether the phrase 'the option' which was used in cl 28 of the HOA which was later amended, applied to all other clauses of the HOA; and (c) whether the mandatory option applies to shares to be transferred to the respondent by DLAC and not only the shares already registered in the name of the respondent.

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Held, dismissing the appeal with costs and affirming the High Court's decision and orders:

(1) The learned High Court judge in making his findings had applied the correct legal principles. The trial judge had construed the plain language of the contract and had determined the intention of the parties objectively by considering the surrounding circumstances. It was found by the learned judge that by the HOA, the respondent's intention was very clear that he wished to exit from Oceanview and Oceancove and sell all his shares to the appellant (see paras 12 & 25).

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(2) The word 'Option' with capital 'O' found in cl 31 of the HOA had been defined in cl 28. This definition shall be applicable throughout the agreement using that reference. Hence it could no longer be strictly construed in accordance with dictionary meaning. The learned judge had correctly held that once the word 'Option' was redefined by the amendment it would be applicable to all the HOA provisions including cl 31 (see para 21).

(3) The announcement made by Benalec Holdings Bhd on 3 January 2013 supported the case of the respondent that after the amendment, the appellant was obligated to buy all of his original shares in Oceanview. On the part of the appellant there was no attempt made to retract this announcement despite the appellant being at the helm of the company. The appellant could not take a contrary stand than what was publicly announced (see paras 22–23).

[Bahasa Malaysia summary

Perayu dan responden telah memasuki penyelesaian di mana perayu mengambil alih 2,157 saham Datuk Leaw Tua Choon ('DLTC') dalam Oceanview, 1,700 saham biasa yang dimiliki oleh DLTC dalam Oceancove dan kepentingan responden dalam Oceanview dan Oceancove. Perayu dan responden kemudiannya memasuki perjanjian awal ('PA') untuk menyelesaikan pertikaian di antara mereka berkaitan kepada saham mereka di dalam Oceanview dan Oceancove. Walau bagaimanapun, pertikaian berbangkit atas tafsiran PA berkaitan tanggungjawab pihak-pihak akibat daripada pemfailan tindakan oleh responden di Mahkamah Tinggi. Perayu mencadangkan kepada responden dan DLTC bahawa PA perlu dipinda untuk mengelak daripada mencetuskan peruntukan di bawah Kod Penggabungan dan Pengambilalihan. Responden bersetuju dan pindaan kepada PA ditandatangani. Isu-isu untuk pertimbangan adalah: (a) sama ada perayu bertanggungjawab untuk membeli saham-saham responden; (b) sama ada frasa 'the Option' yang mana digunakan di dalam klausa 28 PA yang mana kemudiannya dipinda, diguna pakai kepada kesemua klausa lain PA; dan (c) sama ada opsyen mandatori diguna pakai kepada saham-saham untuk dipindahkan kepada responden oleh DLAC dan bukan hanya saham-saham telah didaftarkan di atas nama responden.

Diputuskan, menolak rayuan dengan kos dan mengesahkan keputusan dan perintah Mahkamah Tinggi:

(1) Hakim Mahkamah Tinggi yang bijaksana dalam membuat dapatannya telah mengguna pakai prinsip undang-undang yang betul. Hakim perbicaraan telah mentafsir bahasa biasa kontrak dan telah menentukan niat pihak-pihak secara objektif dengan mempertimbangkan keadaan sekeliling. Ia didapati oleh hakim yang bijaksana bahawa dengan PA tersebut, niat responden adalah jelas bahawa ia berharap untuk keluar

daripada Oceanview dan Oceancove dan menjual kesemua saham-sahamnya kepada perayu (lihat perenggan 12 & 25).

(2) Perkataan 'Option' dengan huruf besar 'O' didapati di dalam klausa 31 PA telah dijelaskan di dalam klausa 28. Definisi ini akan diguna pakai sepanjang perjanjian dengan menggunakan rujukan tersebut. Maka ia tidak lagi ditakrifkan secara ketat mengikut maksud kamus. Hakim yang bijaksana telah secara betul memutuskan bahawa apabila perkataan 'Option' telah dijelaskan semula oleh pindaan tersebut ia akan diguna pakai kepada kesemua peruntukan PA termasuk klausa 31 (lihat perenggan 21).

(3) Pengumuman yang dibuat oleh Benalec Holdings Bhd pada 3 Januari 2013 menyokong kes responden bahawa selepas pindaan tersebut, perayu bertanggungjawab untuk membeli kesemua saham asalnya dalam Oceanview. Bagi pihak perayu tidak terdapat percubaan dibuat untuk menarik balik pengumuman ini walaupun perayu sebagai pemimpin syarikat. Perayu tidak dapat mengambil pendirian bertentangan daripada apa yang telah diumumkan secara am (lihat perenggan 22–23).]

Notes

For a case on interpretation of contract, see 3(4) *Mallal's Digest* (5th Ed, 2017 Reissue) para 5904.

Cases referred to

SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor [2016] 1 MLJ 464; [2016] 1 CLJ 177, FC (refd)

Appeal from: Civil Suit No 22NCC-491–12 of 2014 (High Court, Kuala Lumpur)

Mahinder Singh Dulku (Murad Abdul Aziz and Joanne Loke with him) (Murad Yee Partnership) for the appellant.
Cyrus Das (Tan Yee Boom and WL Lum with him) (David Lai & Tan) for the respondent.

Rohana Yusuf JCA (delivering judgment of the court):

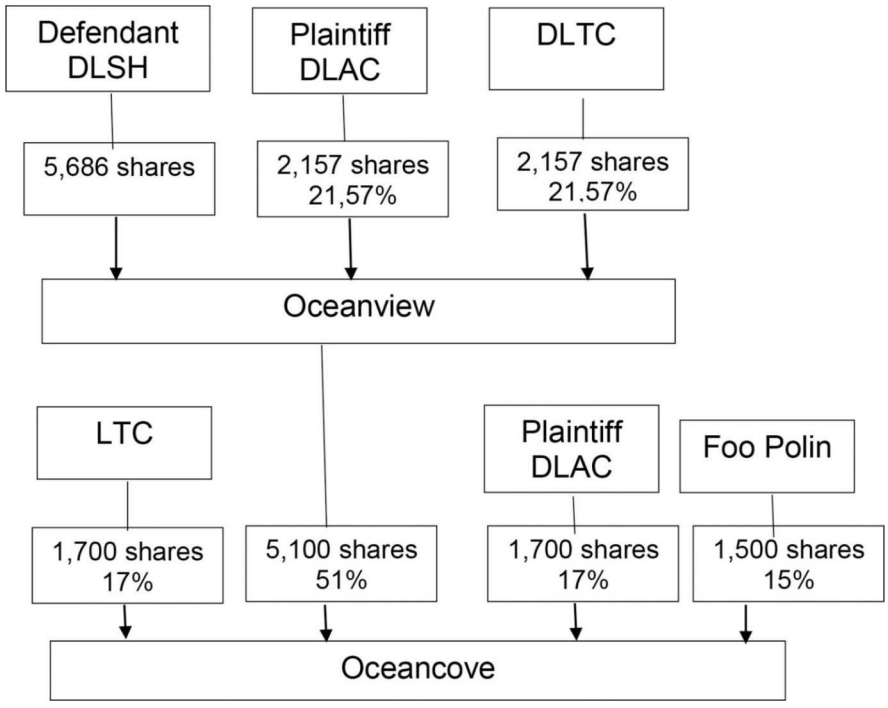
[1] This appeal arises from the decision of the High Court at Kuala Lumpur made on 22 October 2015, where the claim of the plaintiff in relation to an agreement between the parties was dismissed. We had heard the appeal and found no appealable error made by the learned judge and had dismissed the appeal with costs.

[2] The background facts to the claim of the plaintiff was well encapsulated in the grounds of judgment of the learned judge which we reproduce with some

modification for convenience and better appreciation of the issues involved. We will refer to the parties as how they were referred to at the High Court followed with their initials for convenience whenever necessary, since they were referred to by their initials in the heads of agreement, which forms the subject matter of the claim.

[3] Datuk Liew Ah Chye ('the plaintiff DLAC'), Dato' Leaw Seng Hai ('the defendant DLSH') and one Datuk Leaw Tua Choon ('DLTC') are siblings. They together with their now deceased sister, Leaw Guat Hua ('LGH') were running the family business founded by their late father, Leaw Eng Chang through the company Benalec Sdn Bhd. During the early part of 2011, the Benalec Group of Companies successfully underwent a listing exercise under its holding company, Benalec Holdings Bhd ('Benalec').

[4] Prior to the listing of Benalec, the plaintiff DLAC, the defendant DLSH and DLTC together with the estate of LGH's interest in Benalec were re-arranged through the shareholders' agreements of Oceanview Cove Sdn Bhd ('Oceanview') and Oceancove Sdn Bhd ('Oceancove') as follows:



[5] Sometime in November 2013, the three brothers entered into a settlement whereby the defendant DLSH was to acquire:

(a) 2,157 ordinary shares owned by DLTC in Oceanview;

(b) 1,700 ordinary shares owned by DLTC in Oceancove; and

(c) the plaintiff DLAC's interest in Oceanview and Oceancove.

[6] On or about 4 December 2013 DLTC, the plaintiff DLAC and the defendant DLSH, decided to enter into an agreement called heads of agreement ('HOA'). The idea behind the HOA was to resolve the conflict between the brothers wherein various obligations were stipulated in relation to their shares in Oceanview and Oceancove. Disputes however arose on the interpretation of the HOA with regard to the obligations of the parties resulting in the filing of the action by the plaintiff DLAC at the High Court.

[7] Learned counsel for both parties highlighted the following pertinent clauses that require our scrutiny to interpret the obligation clauses imposed under the HOA. The relevant clauses are the following:

> Clause 10
>
> DLTC shall immediately upon execution of this Heads of Agreement transfer all his shares in Oceanview to the plaintiff DLAC and shall immediately upon execution also transfer all his shares in Oceancove to the defendant DLSH.
>
> Clause 28
>
> DLAC further agrees to grant an option to DLSH to purchase all of those 2,157 Ordinary Shares in Oceanview which are to be transferred to him by DLTC ('the Option'). The Option may be exercised at such time as DLSH shall require at a price calculated on the same bases of the market price at the time of exercise of the requisite number of underlying Ordinary Shares of Benalec represented by the number of Ordinary Shares in Oceanview over which the Option is exercised. For the avoidance of doubt the Option may be exercised by DLSH in whole or part at any time. Further, a reference to the market price of an Ordinary Benalec Holdings Berhad share shall mean the average weighted price for the 5 market days immediately preceding the day of the exercise of the relevant Option.
>
> Clause 29
>
> In the event that DLSH exercises the Option or any part thereof DLSH shall pay the requisite consideration for the shares in Oceanview purchased from DLAC under the Option out of the amount of such sums received by DLSH from Oriental Grandeur Sdn Bhd and Oceanlec Pte Ltd (after settling the DLTC Consideration) and DLSH agrees to utilize at least RM10m from DLSH's entitlement from the Pulau Indah Project (as herein referred) towards payment of any shares purchased under the Option.

A Clause 30

In the event DLSH shall exercise the Option or any part thereof and the sums received from Oriental Grandeur Sdn Bhd and Oceanlec Pte Ltd and the Pulau Indah Project shall not be sufficient to pay the consideration therefore DLSH and DLAC shall agree upon a reasonable method and schedule for payment of any part of the purchase price under the Option which may be due from DLSH which may include part payment by way of transfer property and other assets.

Clause 31

DLSH shall exercise the Option in full over all those 2,157 Ordinary Shares in Oceanview which are to be transferred by DLTC to DLAC within 2 years of the date hereof and within one year from the date thereof shall exercise the Option over not less than 30% of the shares in Oceanview which are to be transferred by DLTC to DLAC herein.

Clause 32

DLAC wishes to sell his entire interest in Oceanview and Oceancove to DLSH (in addition to the shares under the Option) and therefore hereby grants to DLSH a Further Option ('Further Option') to DLSH such that after completion of purchase of all the shares under the Option, DLSH shall have the Further Option to purchase each year from DLAC shares in Oceanview and Oceancove representing 3 million Ordinary Shares of Benalec Holdings Berhad at a price calculated on the basis of the market price at the time of exercise of the requisite number of the underlying Ordinary Shares of Benalec Holdings Berhad represented by the number of Ordinary Shares in Oceanview or Oceancove over which the further Option is exercised.

Clause 33

In the event for any calendar year in which DLSH for any reason does not exercise the Further Option in full to purchase share in Oceanview of Oceancove then DLSH and DLAC shall cause Oceanview of Oceancove as the case may be to sell such number of Ordinary Shares in Benalec Holdings Bhd as shall make up the 3 million Ordinary Shares of Benalec Holdings Bhd which underlie the shares in Oceanview or Oceancove which are subject to the Further Option for that particular calendar year. DLSH and DLAC shall thereafter cause Oceanview or Oceancove as the case may be to distribute the proceeds of such sale by way of dividend or otherwise and DLSH shall have the right to use such proceeds as are distributed to him to purchase from the DLAC and DLAC shall sell such shares in Oceanview or Oceancove as the case may be at a price calculated as if DLSH had exercised the Further Option at the time of sale of the relevant Ordinary Shares of Benalec Holdings Bhd.

Clause 34

For avoidance of doubt, should there be any adjustment, division, amalgamation and/or reconstruction of share capital of Benalec, the basis of calculation herein shall be adjusted accordingly.

[8] After the signing of the HOA however, the defendant DLHS told his brothers, the plaintiff DLAC and DLTC, that the initial HOA needed alteration to avoid the triggering of provisions under the Code of Merger and Takeover which would require him to make a mandatory general offer to acquire all the shares in Benalec. The plaintiff DLAC agreed to sign the amendment to the heads of agreement dated 18 December 2013. By that agreement both cll 10 and 28 were amended.

[9] As a result cl 10 was amended as follows:

> DLTC shall immediately upon execution of the Heads of Agreement transfer all his shares in Oceanview to DLSH and DLTC shall immediately upon execution of this Heads of Agreement also transfer 1,218 shares in Oceancove to DLAC and 482 shares in Oceancove to DLSH.

[10] Clause 28 was also amended to reflect that 'the option therein shall refer to the 2,157 shares in Oceanview which are presently registered in the name of DLAC'.

[11] The issue confronted by the learned trial judge was whether under the HOA dated 4 December 2013 and the amendment of heads of agreement dated 18 December 2013, the defendant DHLS has a mandatory obligation to:

(a) purchase from the plaintiff DLAC 647 shares in Oceanview within one year from 4 December 2013 ('the first Option'); and

(b) purchase from the plaintiff DLAC, 1,510 shares in Oceanview within two years from 4 December 2013 ('the second Option').

[12] The learned High Court judge in making his findings had in our view, applied the correct legal principles. In his grounds of judgment he had construed the plain language of the contract, and had determined the intention of the parties objectively, by taking into account the surrounding circumstances. It was found by the learned judge that by the HOA the plaintiff's intention was to exit from Oceanview and Oceancove and sell all his shares to the defendant. This is further borne out by cl 32, where it states in plain terms that DLAC wishes to sell his entire interest in Oceanview and Oceancove to DLSH. Collory to that intention, the plaintiff DLAC resigned as a director of Benalec Holdings Bhd. All these facts supported the findings arrived at by the learned trial judge of the plaintiff's intention to exit. Hence, we do not find error on the part of the learned trial judge in his finding and that the intention of the plaintiff DLAC to exit, was well founded.

[13] The defendant's case hinges on the question of whether or not after the amendment he is still obliged to buy the shares from the plaintiff under cl 31 of the HOA. The question to be determined was therefore whether the phrase 'the

option' used in cl 28 of the HOA which was subsequently amended, will similarly apply to all the other clauses of the HOA including cl 31.

[14] The original meaning of 'Option' was the purchase of the 2,157 shares in Oceanview to be transferred by DLTC to the plaintiff DLAC. Post amendment, 'Option' refers to the same 2,157 shares in Oceanview already registered under the plaintiff DLAC, which means not the 2,157 shares to be transferred from DTLC.

[15] The learned trial judge found cl 31 to be a mandatory option which commanded the defendant DLSH to purchase the 2,157 shares within two years and within one year not less than 30% of the shares in Oceanview. The issue was whether it also covers the shares to be transferred by DLTC to the plaintiff DLAC and not only the shares presently already registered in the name of DLAC. It was found by the learned trial judge that once the definition of 'Option' has been redefined by the amendment it will apply to all the provisions in the HOA including cl 31. Hence it was held by the trial judge that the plaintiff DLAC was entitled to his claim.

[16] The time to exercise the first option had passed while the plaintiff was willing and ready to transfer the 647 shares in Oceanview. Since the calculation on the value of shares was not disputed by the defendant, the learned judge allowed the claim of the plaintiff as prayed in para 25(a) of the amended statement of claim.

[17] It was contended for the defendant that in applying the simple rule of interpretation, resort should be had to the plain dictionary meaning of the word 'Option'. The learned judge was said to have failed to consider the plain and ordinary meaning of 'Option'. Learned counsel cited the various dictionary meanings of the word. It was the submission of learned counsel that the word 'Option' is also a legal term and ought to be legally construed as having a prima facie meaning but not differing from its most ordinary meaning when used in a document intended to have legal effect. In essence, it was submitted that the word 'Option' connotes a choice and literally means optional. The learned judge was said to have erred to rule that cl 31 reflects mandatory option.

[18] Learned counsel for the defendant further criticised the finding of the trial judge for failure to construe the terms of the contract holistically. It was argued that no item in a contract is to be taken in isolation citing the Federal Court decision in *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464; [2016] 1 CLJ 177 as an authority. It was also submitted that the court upon being called to interpret, has no power to improve upon the instrument be it a contract, a statute or articles of association and cannot

introduce a term to make it fairer or reasonable.

[19] We agreed with the approach taken by the learned judge and the findings arrived upon. In our considered view it is a simple rule of interpretation that once an amendment is accepted by the same parties to the contract, they are bound by any change arising from that amendment. We further agreed with the contention of the defendant's learned counsel that the definition of 'Option' in cl 31 is plainly clear that there is no necessity to add 'all those 2,175 ordinary shares in Oceanview which are to be transferred by DTLC to DLAC'.

[20] The learned judge had in our view made a correct observation when he held that:

> if the interpretation of the defendant is taken to be correct then Clause 31 became meaningless and ought to have been deleted. It was not so removed as both parties, being represented by solicitors, knew that Clause 31 referred to the shares being held by the Plaintiff in accordance with the new definition of 'Option' which was provided again with the benefit of legal advice.

[21] The word 'Option' with capital 'O' found in cl 31 of the HOA has been defined in cl 28. This definition shall be applicable throughout the agreement using that reference. Hence it can no longer be strictly construed in accordance with dictionary meaning. The learned judge had correctly held that once the word 'Option' is redefined by the amendment it would be applicable to all the HOA provisions including cl 31.

[22] It must also be noted that Benalec Holdings Bhd as a listed company was required to make announcement under the listing requirement of the stock exchange. It was indeed admitted by the defendant during cross-examination that he is the highest ranking officer of the company and supervising the day to day operation. The announcement made by Benalec Holdings Bhd on 3 January 2013 that:

> Pursuant to the said private Heads of Agreement Datuk Leaw Ah Chye has granted an option, which is exercisable within a 2-year period from the date of the Agreement, to Dato' Leaw Seng Hai to purchase at least 30% of the indirect interest in Benalec shares currently held by Datuk Leaw Ah Chye through his shareholding in Oceanview Cove Sdn Bhd.

[23] The above announcement supports the case of the plaintiff that after the amendment, the defendant is obligated to buy all of his original shares in Oceanview. On the part of the defendant there was no attempt made to retract this announcement despite the defendant being at the helm of the company.

A The defendant cannot take a contrary stand than what was publicly announced.

[24] This announcement did not escape the consideration of the learned trial judge where His Lordship held at para 18 of his judgment that the announcement supported the clear intention of the parties that the defence was to purchase the shares of the plaintiff currently held by him. Hence it cannot be disputed that the announcement refers to cl 31.

[25] In conclusion, we find the learned judge had applied the correct legal principles in giving the plain meaning to the relevant clauses of the HOA. The learned judge had also made correct assessment of facts including the intention of the plaintiff to exit completely from Oceanview and Oceancove, which goes in tandem with the interpretation of cl 31 made by the learned judge.

[26] In the circumstances, we dismissed the appeal with costs and affirmed the decision and the orders made by the learned judge.

Appeal dismissed with costs; decision and orders of High Court affirmed.

Reported by Fatin Mohd Ismail